

VIRGINIA:
IN THE WORKERS' COMPENSATION COMMISSION

Opinion by MARSHALL
Commissioner

Aug. 25, 2023

JESSICA SCHOFIELD v. VILLAGE AVENUE MANAGEMENT, LLC
ARCH INSURANCE COMPANY, Insurance Carrier
GALLAGHER BASSETT SERVICES, Claim Administrator
Jurisdiction Claim No. VA02000039085
Claim Administrator File No. 012181000980WC01
Date of Injury: December 16, 2022

Corey R. Pollard, Esquire
For the Claimant.

Scott C. Ford, Esquire
For the Defendants.

REVIEW on the record by Commissioner Marshall, Commissioner Newman, and Commissioner Rapaport at Richmond, Virginia.

The claimant requests review of the referral to the docket of the July 11, 2023 Employer's Application for Hearing. We REVERSE.

I. Material Proceedings

Pursuant to agreement forms executed by the parties, the Commission entered a January 25, 2023 Award Order. It granted lifetime medical benefits for a left ankle injury occurring December 16, 2022, and temporary total disability benefits at a weekly rate of \$322.50 beginning December 17, 2022.

The defendants filed a May 10, 2023 Employer's Application for Hearing. It sought to change the outstanding award from temporary total to temporary partial disability, and a credit for overpayments made. It alleged the claimant returned to light duty work on or before April 1, 2023

at an average weekly wage of \$130 and failed to report her return to employment/increase in earnings pursuant to Virginia Code § 65.2-712.

On July 11, 2023, the defendants filed a successive Employer's Application for Hearing. In the cover letter, the defendants asserted, "As noted in the attached Affidavit and testimony from this claimant, the claimant was not injured while working as an employee of the insured; instead, claimant was injured while engaged in activities of an independent contractor." The application sought termination/suspension of the outstanding award, or to vacate the award based upon fraud, mutual mistake of fact/mistake, imposition, misrepresentation, concealment, and/or in furtherance of full and complete justice. It also sought a finding of an overpayment to the claimant, and a finding of no jurisdiction over the claim on the basis that the employer did not have three or more employees and the claimant was an independent contractor. Attached to the application was a document titled "affidavit of Jacobi Smith," signed by Jacobi Smith, insurance adjuster with Gallagher Bassett Services. Smith's claim notes and portions of the transcript of the claimant's June 28, 2023 deposition testimony were also attached.

The claimant, by counsel, filed a Motion to Dismiss the July 11, 2023 application the same day. She argued this was simply a case of inadequate investigation by the carrier, and that the carrier could not prove fraud or mistake. She asserted the insurer offered no evidence that she made any false statements. She argued that neither Smith's affidavit nor her deposition testimony supported a finding of fraud. She contended that a claims adjuster's unilateral mistake could not be the basis for vacating an Award Order, and that it would be manifestly unjust to vacate the award under the circumstances.

On July 28, 2023, the Deputy Commissioner issued a letter advising the parties that, on July 27, 2023, the Commission found probable cause to refer the July 11, 2023 application to the hearing docket.¹

On August 3, 2023, the claimant filed a Request for Review of the probable cause finding. Therein, she reiterates the arguments made in her July 11, 2023 motion.

II. Findings of Fact and Rulings of Law

An application for hearing must demonstrate the requisite probable cause to justify suspending benefits and docketing the application for a hearing on its merits. “Probable cause exists if the facts and circumstances are sufficient to justify a prudent and reasonable person in the belief that the allegations, if true, would prevail.” *Hunt v. Cox Commc’ns, Inc.*, VWC File No. 240-27-37 (Oct. 1, 2010) (citing *Giant of Va. v. Pigg*, 207 Va. 679, 684 (1967)). “[T]he employer need not present evidence to fully support its application at this stage of the proceedings, but at a minimum must submit sufficient evidence to allow a finding that there is a reasonable probability that it will succeed on the merits of the claim.” *Jesse-Hunt v. Stirlings Auto Repair*, VWC File No. 217-00-83 (Dec. 13, 2006). In rendering a decision as to probable cause, the Commission does not require the employer to establish a prima facie case, but weighs the evidence submitted by both parties in determining whether sufficient grounds exist to suspend benefits pending a hearing. *Crosby v. Cent. Coca-Cola Bottling*, VWC File No. 155-72-93 (Aug. 18, 1998).

¹ The Commission’s file reflects that, on July 27, 2023, a Staff Attorney found the July 11, 2023 application passed probable cause review.

We have carefully reviewed the evidence submitted by the employer in support of its July 11, 2023 application. We conclude it is insufficient to establish there is a reasonable probability that it will succeed on the merits of its application. The defendants' application is premised on the allegation that the claimant, an ice-skating instructor, was working as an independent contractor, not any employee, while providing private skating lessons, and that the claimant concealed that she was teaching private skating lessons at the time of the accident. Smith's affidavit states that the claimant never told her she was providing private lessons when she was injured on December 16, 2022. Rather, the claimant told Smith that she was injured while providing a small group lesson for the employer. The affidavit also states that, "Had Ms. Schofield reported to me that she was working as an independent contractor when he was hurt on December 16, 2022, I would not have recommended acceptance of her claim." Smith's notes reflect that the description of the accident reported was that the claimant was "teaching students" at the time of the accident.

The deposition transcript excerpts attached to the application include the claimant's testimony that she taught both private and group lessons, and that it was her understanding that she was an independent contractor while providing private lessons and an employee while providing group lessons. In her testimony, the claimant described teaching small group lessons to prepare skaters for a holiday show on December 17, 2022. She also described the process of obtaining clients for private lessons. She agreed that her W2 reflected earnings from providing group lessons. She received a 1099 for her earnings from giving private lessons.

The documentation attached to the employer's application is evidence that the claimant provided both private and group lessons and that she reported to the defendants that she was injured

while providing a group lesson. However, crucially, there is no evidence suggesting that she was performing a private lesson rather than a group lesson at the time of the accident. Additionally, the defendants have submitted no evidence to establish the claimant attempted to mislead or defraud them. We do not find probable cause to establish fraud, concealment, misrepresentation, imposition, or mistake. Additionally, based upon the evidence submitted, we do not find probable cause to establish this is a case that may require the Commission to otherwise exercise its authority to do full and complete justice.

For these reasons, we find the July 11, 2023 application lacks the requisite probable cause to justify docketing it for a hearing on the merits. We do not address the remainder of the claimant's arguments.

III. Conclusion

The July 27, 2023 referral to the hearing docket of the July 11, 2023 Employer's Application for Hearing is REVERSED.²

This case is ORDERED removed from the review docket.

APPEAL

You may appeal this decision to the Court of Appeals of Virginia by filing a Notice of Appeal with the Commission and a copy of the Notice of Appeal with the Court of Appeals of Virginia within thirty (30) days of the date of this Opinion. You may obtain additional information concerning appeal requirements from the Clerk's Offices of the Commission and the Court of Appeals of Virginia.

² The claimant's compensation was previously suspended pursuant to the filing of the defendants' May 10, 2023 application, which is not before us on review.